91-1001

No. _____

In The

Supreme Court of the United States

October Term, 1991

NYE COUNTY, NEVADA, AND BERNIE C. MERLINO, NYE COUNTY ASSESSOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state statute levying a possessory use tax based upon the value of exempt government property violates the federal government's immunity from state taxation under the Supremacy Clause of the United States Constitution when the government property is made available to and used by an independent contractor in a business conducted for profit and the intent and effect of the statute is to tax only the contractors possessory use.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

A writ of certiorari is respectfully sought by Nye County, Nevada, to review the Court of Appeals decision finding a state taxing statute as applied to a government contractor unconstitutional because it violates the immunity of the federal government from state taxation.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, reported at 938 F.2d 1040, appears as Appendix C.

The Findings of Fact, Conclusions of Law and Judgment and Final Judgment of the District Court are not reported and appear as Appendices A and B, respectively.

JURISDICTION

The judgment of the Court of Appeals (App. D) was entered July 15, 1991. A petition for rehearing was denied on September 18, 1991 (App. E). The jurisdiction of the lower federal courts was invoked under 28 U.S.C. §§ 1331 and 1345. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions and statutes:

I. Article VI, clause 2 of the United States Constitution, appears as Appendix F.

II. Nev. Rev. Stat. § 361.159, appears as Appendix G.

STATEMENT OF THE CASE

This case concerns the validity of a state taxing statute as applied to an independent government contractor, Arcata Associates, Inc. (Arcata), performing its contract

with the United States Air Force on the electronic combat ranges in Nye County, Nevada.[1]

Arcata is a corporation which provides certain technical services to the Air Force under a cost-plus contract negotiated on a yearly basis. The services provided consist of supplying civilian technicians who maintain and operate sophisticated electronics property owned by the Air Force. The property is used in military air combat training exercises in which the pilots' skills are measured and scored by various electronic devices positioned at different locations on the combat ranges. Arcata employees spend approximately 75% of their time maintaining the property and 25% operating the property.

Arcata owns none of the property it uses in the performance of its contract with the Air Force and claims no ownership interest therein. All of the property is furnished directly to Arcata by the Air Force.

The Air Force reimburses Arcata for all the costs of performing the contract. In addition, Arcata is paid an annual fixed fee of 2% of the cost of performing the contract that year. The contract also provides for up to an additional 6% to be paid Arcata as a performance bonus. The exact amount paid depends on a subjective evaluation by the Air Force of Arcata's performance. For the

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[1] The combat ranges are within a large area withdrawn from public entry and used exclusively for national purposes such as Air Force bombing and training ranges and nuclear device development and testing. The withdrawal comprises about 65% of the total area of Nye County, Nevada. The combat ranges are commonly referred to as the Tonopah Test Range.

years 1983-1989, the yearly cost of performing the contract averaged approximately $6,747,000.00. Arcata has received a performance bonus every year.[2]

Nev. Rev. Stat. § 361.159, authorizes Nye County to levy a tax on Arcata's use of exempt government-owned personal property used in the performance of its contract with the Air Force. Computation of the tax is based on the value of the personal property and the percentage of time Arcata uses the property during the tax year. Value of the property and percent of use are declared by Arcata on declaration forms supplied by Nye County and Nye County relies on Arcata's declarations in computing the tax. The Nye County Assessor accepts the declarations of Arcata at face value. He makes no independent effort to evaluate either the value of the property or the percentage of use declared by Arcata.

The tax is computed by applying the county tax rate to the assessed value of the property.[3] Nye County is not taxing any ownership interest under Nev. Rev. Stat. § 361.159, neither the government's nor Arcata's.

The practical result of the application of the tax is that Arcata is taxed only for its actual use of the property, regardless of whether that use is 1% or 100% during the tax year. The property itself is not taxed. Arcata pays the

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[2] The record does not disclose the exact dollar amount of the bonuses or the percentage of the cost of performing the contract that the bonuses represent.

[3] Assessed value is 35% of the value of the property as declared by Arcata.

tax, not the Air Force.[4] The amount of taxes in controversy paid by Arcata is $127,444.03 for the fiscal years 1983-1984 through 1988-1989.

On July 11, 1986, the United States filed suit against Nye County and the Nye County Assessor seeking a declaratory judgment and injunctive relief against the assessment of any additional taxes against Arcata under Nev. Rev. Stat. § 361.159, and reimbursement of taxes paid by Arcata for the years 1983-1989.

At trial, the evidence established that Arcata has considerable discretion in carrying out its duties under the contract. The evidence also established that Arcata has no ownership interest in the government property it uses to perform the obligations of its contract. The evidence also established that Nye County only taxes Arcata's actual percentage of use of the property based entirely upon the declarations submitted by Arcata as to the value of the property and the percentage of time during the tax year that Arcata uses the property.

In addition, the evidence clearly showed that the tax is only applied upon Arcata's possessory use of the property and is not an *ad valorem* property tax based upon the value of the property.

The trial court concluded that Nye County could not impose a tax on Arcata because Arcata has no personal ownership or beneficial interest in the property since the contract conveys no property interest to Arcata, and,

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[4] Arcata is reimbursed by the Air Force for the cost of the tax under the terms of the "cost-plus" contract.

therefore, the tax imposed is an *ad valorem* property tax on the United States which is prohibited by the Supremacy Clause of the United States Constitution. App. 6-7.

This ruling appears to be in direct conflict with the evidence presented at trial.

On appeal Nye County argued that both the language and the application of Nev. Rev. Stat. § 361.159 was designed to tax only the possessory use of United States property by an independent contractor carrying on a business conducted for profit.

Nye County argued that prior decisions of this Court starting with *U.S. v. City of Detroit*, 355 U.S. 466 (1958), and culminating with *U.S. v. New Mexico*, 455 U.S. 720 (1982), have uniformly held that a state is not forbidden from taxing the possessory use by an independent contractor of United States owned property regardless of whether the tax is measured by the value of the United States' property and regardless of whether the contractor has any ownership or leasehold interest in the government's property.

This court has held that the only instance where constitutional immunity would apply is when the facts clearly establish that the contractor is so incorporated into the government structure as to become an instrumentality of the United States. *U.S. v. Boyd*, 378 U.S. 39 (1964).

In this case, the United States conceded that Arcata was not an agent or instrumentality of the federal government. App. 12.

The Court of Appeals, in a 2-1 decision, affirmed the ruling of the trial court holding that Nev. Rev. Stat. § 361.159 "effectively lays an ad valorem general property tax on property owned by the United States." App. 16.

The majority, while stating that they do not "exalt form over substance" held "that when a statute says it taxes property it probably does. And when it says it doesn't, it probably doesn't." App. 15.

The majority stated that since the language of Nev. Rev. Stat. § 361.159 taxes the user "in the same amount and to the same extent as though the lessee or user were the owner of the property," that the tax is a property tax on property owned by the United States and therefore violates the constitutional immunity of the United States from state taxation. App. 15-16.

In a strongly worded dissent, Judge Noonan correctly noted:

> that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

App. 17.

Judge Noonan said *"New Mexico* defined the approach that should be taken today to a state tax on an entity using property of the United States." App. 16.

Judge Noonan noted that the Nevada statute expressly exempts property of the United States from

taxation and that there is no intention by the State to tax property of the United States. *New Mexico,* he further noted, held that it is irrelevant that the economic burden of the tax might ultimately fall on the government and that it is also irrelevant that the contractor owns none of the property being used.

Nye County's petition for a rehearing and suggestion for rehearing *en banc* was denied.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted because the decision of the Court of Appeals creates an intolerable conflict with the decision of the Nevada Supreme Court on the constitutionality of the statute.

Prior to 1988 this case would have been before this Court by direct appeal.

Shortly after Nevada implemented Nev. Rev. Stat. § 361.159, the United States challenged in the Nevada courts the constitutional validity of the tax as applied to independent contractors using exempt government property to perform their contracts with the government on federal land within Nye County, Nevada. *United States v. State ex rel. Beko,* 88 Nev. 76, 493 P.2d 1324 (1972).

The Nevada Supreme Court upheld the constitutionality of the statute as written, and as applied, relying on this Court's decisions in *Boyd, City of Detroit,* and *United States v. Township of Muskegon,* 355 U.S. 484 (1958), in finding that a contractor's use of government property in connection with commercial activities carried on for

profit is a separate and distinct taxable activity on which the state could properly levy a use tax. *Beko,* 88 Nev. at 83.

In the instant case the Court of Appeals decision specifically held that the tax "is an *ad valorem* tax on property of the United States and as such it is unconstitutional" because it is violative of the right of the federal government to be free from state taxation. App. 16.

This decision creates an intolerable conflict between the Court of Appeals and the highest court of the State of Nevada regarding the right of the state to levy use taxes on government contractors conducting business within the state.

Further, this decision creates the potential for a multiplicity of suits because every government contractor performing a cost-plus contract with the United States anywhere in the State of Nevada may now sue for a refund of taxes paid under the statute since the *Beko* decision in 1972.

Review by this Court is appropriate to resolve the intolerable conflict between the Nevada Supreme Court decision upholding the constitutionality of the statute and the Court of Appeals decision invalidating the statute under the Supremacy Clause.

II. Certiorari should be granted because the Court of Appeals, in direct conflict with decisions of this Court, decided that a state taxing statute violates governmental immunity from taxation under the Supremacy Clause of the United States Constitution.

This case presents an extremely important question concerning the authority of a state to tax government

contractors operating within the state and the federal government's immunity from state taxation.

The statute involved here, Nev. Rev. Stat. § 361.159, levies a tax on the use by independent government contractors of otherwise exempt federal government property.

This Court has previously decided a number of cases which presented the issue of whether a state may constitutionally levy a use tax on an independent contractor who uses exempt government property to perform its contract.

The benchmark case in this area is *United States v. City of Detroit*, 355 U.S. 466 (1958), in which this Court held that a state may constitutionally levy a use tax on an independent government contractor's use of exempt government property used in the performance of its contract. The Court held that such a tax may be based on the value of the property being used and that the tax is not unconstitutional merely because the economic burden of the tax will ultimately fall on the United States.

In a companion case, *United States v. Township of Muskegon*, 355 U.S. 494 (1958), this Court also held that it is immaterial to the constitutionality of a state taxing statute that the contractor has no leasehold or other ownership interest in the property being used and that it is also immaterial that the contractor does not use the property to supply goods or services to anyone other than the United States.

Further in *City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958), this Court, in addressing the

issue of whether the language of the statute is more important than the legislative intent and the actual application and effect of the statute, said it looks only to the practical effect of the tax and not its definition or the descriptive words which may be applied to it:

> As applied – and of course that is the way [the tax] must be judged – the taxes here imposed a levy on a private party possessing government property which it is using or possessing in the course of its own business.

Id. at 493.

Later, in *United States v. Boyd*, 378 U.S. 39 (1964), this Court reaffirmed the principles laid down in *City of Detroit, Township of Muskegon*, and *Murray Corporation*, holding that the use by a contractor of otherwise exempt government property in connection with the contractor's commercial activities carried on for profit is a separate and distinct taxable activity.

The latest decision of this Court which has examined the constitutional limits on a state's ability to impose use taxes on independent government contractors using government property to perform their contracts was *United States v. New Mexico*, 455 U.S. 720 (1982).

In *New Mexico*, this Court again reaffirmed the principles laid down in *City of Detroit, Township of Muskegon, Murray Corporation*, and *Boyd*.

Further in *New Mexico*, this Court said that conferring immunity on a contractor is appropriate in only one circumstance:

> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

Id. at 735. "To resist the state's taxing power, a private taxpayer must actually stand in the government's shoes." *Id.* at 736.

As previously indicated, the United States conceded that Arcata is not an agent or instrumentality of the government. Therefore the relationship between the United States and Arcata is one which creates distinctly separate entities. As pointed out by Judge Noonan:

> . . . Arcata conducts the military games for its own profit. In the terms expressly used by *New Mexico* Arcata is engaged in "commercial activity carried on for profit." [Cite omitted.] Consequently, Arcata does not enjoy immunity from Nye County's tax.

App. 19.

To this Court, then, the only issue is whether or not the contractor can be considered an instrumentality or constituent part of the federal government.

In this case, the Court of Appeals apparently did not consider this to be the issue since the majority found the Nevada statute unconstitutional merely because the amount of the tax is based on the value of the exempt property being used by the contractor.

In addition, the majority of the Court of Appeals appeared to believe that if Arcata had no ownership interest in the property, or did not use the property to supply goods or services to another party other than the government, for a profit, then Arcata had no beneficial use of the property and therefore was not engaging in any taxable activity.

The resulting decision of the Court of Appeals is therefore directly contrary to the criteria set out by this Court to be used in evaluating the constitutionality of a state taxing statute.

Lastly, the Court of Appeals concluded that the wording of a tax statute is more important than the intent of the legislators and the actual application and effect of the statute. To the majority, in this case, the language of Nev. Rev. Stat. § 361.159 which imposes the tax on a private user of otherwise exempt property, "in the same amount and to the same extent as though the lessee or user were the owner of the property", is more important than examining the intent of the statute, the way the statute is applied, and the actual effect of the tax on the contractor.

This conclusion was correctly characterized by Judge Noonan in his dissent as follows:

> It is difficult to imagine a more wooden and technical approach than that taken by the majority in finding constitutional significance in the language used by the state to describe its tax.

App. 21.

In *Murray Corporation* it was made clear to the lower courts that they "must look through form and behind labels to substance" in determining whether a tax violates the government's constitutional immunity. 355 U.S. at 492. The Court of Appeals in this case ignored this Court's guidance as set forth in *New Mexico* and its predecessors. It was suggested by this Court in *New Mexico* that:

> If political or economic considerations suggest that a broader immunity rule is appropriate, "such complex problems are ones which Congress is best qualified to resolve."

455 U.S. at 744, citing *City of Detroit*, 355 U.S. at 474. The Court further suggested that the government should not request the courts to establish as a constitutional rule something it was unable to obtain statutorily from Congress. *Id.*

This is precisely what the United States has obtained by the Ninth Circuit's decision in this case. This decision significantly expands the narrow constitutional limits of governmental immunity under the Supremacy Clause.

Such an expansion should only be accomplished by Congressional action. To do otherwise will produce deleterious effects far beyond the circumstances of this particular case.

The conflict between the right of the United States to be free from state taxation and the concomitant right of the states to levy taxes on government contractors doing business within their borders raises a substantial federal question which has a significant impact on the public at large.

Review is appropriate to examine the conflict between the Ninth Circuit Court of Appeals decision in this case with prior decisions of the Supreme Court.

CONCLUSION

For the reasons set fourth above, a writ of certiorari should issue to review the decision of the Ninth Circuit Court of Appeals on these issues.

Respectfully submitted,

ARTHUR F. WEHRMEISTER
District Attorney
Nye County, Nevada

Counsel of Record
for Petitioners

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NYE COUNTY, NEVADA and BERNIE C. MERLINO, Nye County Assessor,

Defendants.

_____/

CV-S-86-670-HDM

FINDINGS OF FACT, CONCLUSIONS OF LAW, and JUDGMENT

(Filed Sept. 1, 1989)

FINDINGS OF FACT

1. The plaintiff, United States, commenced this action to secure a declaratory judgment that taxes assessed by Nye County, Nevada, under the provisions of section 36.159 [sic] of the Nevada Revised Statutes, infringe upon the immunity of the United States from state and local taxation, and are, therefore, unconstitutional. The complaint also seeks a refund of taxes that have been paid to the defendant, Nye County, by the contractor, Arcata, for the fiscal years 1983 through 1988.

2. The plaintiff, United States, is a corporate sovereign and body politic.

3. The defendant, Nye County, Nevada, is a political subdivision of the State of Nevada and is within the jurisdiction of this court, and its officials, employees, and agents have taken the actions and issued the assessments complained of in the complaint in this action.

4. The defendant, Bernie Merlino, is the County Assessor of Nye County, and is charged by Nevada law with the assessment of property and collection of taxes imposed on personal property under the provisions of Nev. Rev. Stat. § 361.159 (1987).

5. The United States Air Force operates the Tolicha Peak Electronic Combat Range and Tonopah Electronic Combat Range in Nye County, Nevada.

6. Arcata Associates (Arcata) was awarded a cost reimbursement contract with four renewable annual option periods commencing in 1980. The latest renewal was for the fiscal years 1986-1990. Arcata operates grounds systems associated with the simulated Soviet defense systems when and as directed by Air Force personnel.

7. Payments under the contracts include a base fee, a performance award fee, and reimbursement of the costs of performing the contract.

8. All of the equipment used by Arcata is owned by the United States. There is a certain amount of electronic test equipment and vehicles leased by Arcata, but this leased property is owned by non-exempt commercial entities and is not in dispute in this litigation.

9. Neither the Arcata contract with the Air Force nor any agreement, nor any deed, lease, conveyance, license, or any other document confers on Arcata any estate, leasehold, license, permit, or any other right, title, or interest in the government-furnished property.

10. Arcata does not pay, and is not obligated to pay, any rent, fee, charge, or any other consideration in

exchange for its operation or maintenance of the property owned by the Air Force.

11. The contract provides that Arcata operates and maintains the equipment in accordance with the direction of the Air Force.

12. All of the work performed by Arcata is performed for the Air Force. Arcata does not use any of the property for any purpose other than the performance of work for the Air Force at the direction of the Air Force under the contract. Arcata does not have the right to use the equipment or property for its own account or for its own business and derives no profits from the property except under the terms of the services contract.

13. The risk of loss of all of the property is solely on the United States as the owner of the property, except in instances of any willful misconduct or lack of good faith on the part of Arcata.

14. The contract also provides that the United States may terminate the contract for its convenience at any time with or without notice to Arcata.

15. Arcata's only access and control over the property is at the direction of the United States at such times and places and in such manner as specified by the United States.

16. Arcata cannot exclude Air Force personnel or other contractors from operating or maintaining any of the equipment.

17. Under the provisions of the contract, the United States is obligated to reimburse Arcata for any taxes paid

by Arcata on property owned by the United States in performing Arcata's contract.

18. The fees paid to Arcata are not related to the value of the property it operates and maintains. Arcata is paid a base fee and a performance award fee that is based on the Air Force's evaluation of Arcata's response to the requirements of the Air Force in connection with operations and maintenance.

19. Arcata has paid taxes to Nye County under protest as follows: for the year 1983-1984, $11,852.24; for the period 1984-1985, the sum of $18,952.94; for the year 1985-1986, the sum of $12,191.77; for the year 1986-1987, the sum of $6,014.15; for the year 1987-1988, the sum of $45,968.61; and for the year 1988-1989, the sum of $32,434.32.

20. Arcata has no beneficial use of the property of the United States that it operates and maintains.

21. To the extent these findings of fact are deemed to be conclusions of law they shall constitute conclusions of law.

CONCLUSIONS OF LAW

1. This court has jurisdiction pursuant to Sections 1331 and 1345 of Title 28 of the United States Code.

2. The United States has a direct pecuniary interest in this action and has standing to bring this suit. *United States v. Dekalb County*, 729 F.2d 738, 741-42 (11th Cir. 1984).

3. Nevada Revised Statute § 361.159, under which Nye County has imposed the tax in question here, provides in pertinent part:

> Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a natural person, association or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property. . . .

4. A state may not, under the supremacy clause, impose a tax on the United States upon property of the United States. *McCulloch v. Maryland*, 17 U.S. 316 (1819); *United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *aff'd mem. sub nom. Jefferson County, Colo. v. United States*, 450 U.S. 901 (1981).

5. A state may impose an *ad valorem* tax on federal property in the possession of a third party who holds under a lease or bailment. The tax, however, must be restricted to the beneficial interest the third party has in the taxed property. The mere use of the property under a service or management contract does not create a taxable beneficial interest in the third party. *United States v. Colorado*, 460 F. Supp. 1184 (D. Colo. 1978), *aff'd*, 627 F.2d 210 (10th Cir. 1980), *aff'd mem. sub nom Jefferson County, Colo. v. United States*, 450 U.S. 901 (1981); *United States v. Allegheny County*, 322 U.S. 174 (1944); *United States v. New Mexico*, 455 U.S. 720, 741 at n.14 (1982); *United States v. Fresno*, 429 U.S. 452, 466 at n.15 (1977); *United States v.*

Anderson County, Tenn., 761 F.2d 1169 (6th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985).

6. Arcata has no personal ownership or beneficial interest in the federally owned property which Arcata uses in the performance of its personal services contract. The record reflects that Arcata does not own or lease the property. The property is used by Arcata to discharge its responsibilities to the government pursuant to a services contract between the Air Force and Arcata.

7. The express terms of the contract between the Air Force and Arcata conveys no property interest to Arcata of any real or tangible personal property located at the Air Force combat range in Nye County, Nevada. *United States v. Jackson County, Mo.*, 696 F. Supp. 479, 484 (W.D. Mo. 1988).

8. Here, the Air Force has reserved such control over the activities of Arcata that Arcata is a servant of the United States. Arcata has access to the equipment only for the purpose of operating and maintaining the equipment at the direction of the Air Force.

9. The contract between the Air Force and Arcata grants Arcata a license to enter the Air Force combat range to operate and maintain the Air Force equipment. *Id.* at 486. The court cannot conclude that the provisions of Nev. Rev. Stat. § 361.159 (1987) permit a tax to be imposed on the functions engaged in by Arcata under its service contract with the Air Force.

10. Having so found, the court concludes the imposition of an *ad valorem* tax on the property the subject of this litigation for the tax years in controversy in this case

is a tax on the United States and is prohibited by the supremacy clause. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

11. To the extent these conclusions of law are deemed to be findings of fact, they shall constituted [sic] findings of fact.

Therefore, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED;

2. The defendants are enjoined from assessing or collecting the tax imposed by Nev. Rev. Stat. § 361.159;

3. The defendant shall refund to plaintiff taxes paid for the year commencing July 1983; and

4. Plaintiff shall prepare a judgment consistent with these findings and conclusions and submit the same to the court within ten (10) days of the date of this order.

DATED this 28th day of August, 1989.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

APPPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NYE COUNTY, NEVADA, et al.,

Defendants.

_____/

CV-S-86-670-HDM

FINAL JUDGMENT

(Filed Oct. 6, 1989)

This matter having come on for trial on June 13, 1989, and the court having considered the witnesses and exhibits offered thereat, and having entered findings of fact and conclusions of law, does hereby, pursuant to Rule 54 of the Federal Rules of Civil Procedure,

ORDER, ADJUDGE and DECREE that the United States is entitled to declaratory judgment that:

The defendants may not impose the tax authorized by Nev. Rev. Stat. § 361.159, on Arcata Associates, a United States Air Force contractor, because Arcata has no personal ownership or beneficial interest in the property which it uses to perform its personal services contract with the Air Force and because that contract conveys no property interest to Arcata in the real and tangible personal property located in Nye County, Nevada, on the Air Force Tolicha Peak and Tonopah Electronic Combat Rangers; and, therefore, the ad valorem tax imposed by the defendants is a tax on the United States which is

prohibited by the Supremacy Clause of the United States Constitution.

It is further ORDERED, ADJUDGED and DECREED that the defendants, their successors in office, their employees, agents, attorneys and all persons acting in concert with them who shall receive notice thereof, are permanently enjoined from assessing, imposing or collecting from Arcata or the United States, ad valorem personal property taxes pursuant to Nev. Rev. Stat. § 361.159, on the property of the United States located in Nye County, Nevada, on the Air Force Tolicha Peak and Tonopah Electronic Combat Ranges or on any alleged "interest" of Arcata in that property.

It is further ORDERED, ADJUDGED and DECREED that the defendant Nye County, Nevada, is liable in general assumpsit to the United States for money had and received in the total amount of $127,414.03 consisting of ad valorem personal property taxes paid by Arcata and reimbursed by the United States for the tax years 1983-84 through 1988-1989 as set forth below:

Tax Year	Amount of Tax Payment	Date Tax Paid to Defendants
1983-84	$ 11,852.24	Jan. 23, 1984
1984-85	18,952.94	Oct. 1, 1984
1985-86	12,191.77	Oct. 1, 1985
1986-87	6,014.15	Sept. 25, 1986
1987-88	45,968.61	Nov. 25, 1987
1988-89	32,434.32	July 21, 1988
	$127,414.03	

DATED this 5th day of October, 1989.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

NYE COUNTY NEVADA; Bernie C. Merlino, Nye County Assessor,
Defendants-Appellants.

No. 90-15128.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1991.

Decided July 15, 1991.

Appeal from the United States District Court for the District of Nevada.

Before PREGERSON, NOONAN and THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

The United States challenges Nye County's imposition of a tax on Arcata Associates, Inc. (Arcata), a defense contractor. The United States argues that the tax violates the Constitution because it, in effect, is a tax upon property of the United States. The district court entered judgment for the United States, enjoined further assessments of the tax by the County and adjudged the County liable for the taxes previously paid. We hold that the tax Nye County levied on Arcata is an *ad valorem* tax on property owned by the United States government. As such, the supremacy clause and *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed 579 (1819), render the tax unconstitutional. We therefore affirm.

FACTS

Arcata is an independent federal contractor.[1] It maintains and operates government-owned electronic equipment used by the United States AIr Force to simulate Soviet defense systems at the Tolicha Peak Electronic Combat Range and the Tonopah Electronic Combat Range in Nye County, Nevada. The Air Force uses these systems and devices to train Air Force pilots. Pursuant to its contract with Arcata, the United States reimburses Arcata for all costs incurred by the company and, in addition, pays Arcata a fixed base fee and a performance award fee for its services.

The Air Force directs Arcata's operation of all government-owned equipment. Arcata does not have the right to use the equipment for its own account or business. It has no property interest in the equipment. Its only access to the equipment is at the time and place and in the manner directed by the United States. Arcata cannot exclude Air Force personnel or other contractors from operating or maintaining the equipment. The United States can terminate its relationship with Arcata at will.

Nye County contends Arcata has a taxable interest in the equipment. It assessed a personal property tax against Arcata under Nev. Rev. Stat. 361.159, as if Arcata were the owner of the equipment. The statute provides in pertinent part:

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[1] The United States concedes that Arcata cannot be considered an agent or instrumentality of the government.

> 1. Personal property exempt from taxation which is leased, loaned or otherwise made available and used by a natural person, association or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property . . .

Unpaid taxes under this statute do not become a lien on the property but are an obligation of the lessee or user. *Id.* § 361.159.2. For tax years 1983-84 through 1988-89 taxes assessed against Arcata under the statute totaled $127,414.03. Arcata paid these taxes under protest. The United States reimbursed Arcata as required by Arcata's contract. It then sued Nye County to recover the taxes, to obtain a declaratory judgment that assessment of the taxes was unconstitutional, and to enjoin further assessment. After a bench trial, the district court entered judgment in favor of the United States. Nye County appeals.

DISCUSSION

The unconstitutionality of Nye County's tax is best understood by comparing it to tax measures that have survived, and those that have perished, in the face of *ad valorem* challenges. The survivors have been tax measures imposed on an isolated possessory interest or on a beneficial use of United States property. The perished have been tax measures levied on the property itself.

Of the survivors, *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977), illustrates a possessory use tax. There, California taxed possessory

interests in federally owned housing held by federal forest rangers. The Supreme Court refused to invalidate the tax, holding that, to the extent a state can isolate a private person's property interest in property owned by the United States, the state can tax the interest. *Id.* at 462, 97 S.Ct. at 704-05.

A beneficial use tax was at issue in *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). There the Court upheld the tax because it was measured by the gross receipts of the lessee. The Court concluded: "In effect, the gross receipts tax operates as a tax on the sale of goods and services." *Id.* at 727, 102 S.Ct. at 1379. In *United States v. City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958), the amount of the tax was computed with reference to the value of the United States property used by the lessee, but because the tax reached only the lessee's beneficial use, the tax was upheld. The Court stated: "A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country." *City of Detroit*, 355 U.S. at 470, 78 S.Ct. at 476.

Tax measures which have perished under an *ad valorem* challenge are exemplified by *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *summarily aff'd sub nom. Jefferson County v. United States*, 450 U.S. 901, 101 S.Ct. 1335, 67 L.Ed.2d 325 (1981), and *United States v. Hawkins County*, 859 F.2d 20 (6th Cir. 1988). In *Colorado*, the Tenth Circuit, after stressing that the contractor in the case held no leasehold interest in the government property, invalidated the tax. The tax could not be upheld because "the State of Colorado [sought] to impose a tax on [the contractor] to be measured by the value of the [United States

land]. . . . " 627 F.2d at 220. Similarly, in *Hawkins County*, the Sixth Circuit invalidated a Tennessee tax statute because it "fairly cannot be said to impose a tax on [the private entity's] beneficial use; instead, the statute describes an ad valorem tax on an interest in real property." *Hawkins County*, 859 F.2d at 23.

The teaching of the foregoing cases is that the wording of a tax measure is significant. This does not mean we exalt form over substance. It means that when a statute says it taxes property it probably does. And when it says it doesn't, it probably doesn't. In *County of Fresno*, the Court upheld California's levy of a tax on the possessory interest of federal employees. In *New Mexico*, the Court upheld New Mexico's tax on the gross receipts of an entity that used federal land. In *City of Detroit*, the Court upheld a tax on a private entity's beneficial use of United States property even though the beneficial use was measured by the value of the property. In none of these cases was the property itself the subject of the tax.

In contrast, the Nevada statute under which Nye County seeks to impose its tax against Arcata taxed the user "in the same amount and to the same extent as though the lessee or user were the owner of the property." Nev. Rev. Stat. § 361.159. Here, the property belongs to the United States. Arcata has no leasehold interest in it, but merely has the privilege, terminable at the will of the government, to use the property at the time and place and in the manner directed by the United States. Nye County makes no attempt to segregate and tax any possessory interest Arcata may have in the property, or Arcata's beneficial use of the property. Nye County simply taxes Arcata as if it were the owner of the

property. The tax effectively lays "an *ad valorem* general property tax on property owned by the United States." *Colorado*, 627 F.2d at 221. As the Sixth Circuit concluded in *Hawkins County*:

> Whether or not the Tennessee legislature had in mind a tax on beneficial use, it unquestionably did not describe one when it enacted the statute in question. Since [the contractor] has been determined not to have a real property interest in the facility, Tennessee's attempt to tax [the contractor] resulted in what was, in reality, a tax upon the United States itself.

Hawkins County, 859 F.2d at 24.

While Nye County could no doubt enact a statute taxing a lessee's possesory interest in, or a user's beneficial use of, property owned by the United States, the statute under which it levied taxes against Arcata is not such a tax measure. The Nye County tax is an *ad valorem* tax on property of the United States and as such it is unconstitutional. The judgment of the district court is AFFIRMED.

NOONAN, Circuit Judge, dissenting:

The classic case in this area is, of course, *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). The path from *McCulloch* to *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), has been neither straight nor clear. The precedents have been "confusing". *Id.* at 733, 102 S.Ct. at 1382. The lines drawn were "excessively delicate." *Id.* at 730, 102 S.Ct. at 1381. *New Mexico* defined the approach that should be taken today to a state tax on an entity using property of the United States.

Less than ten years after *New Mexico* was decided by a unanimous Court, however, the present majority embarks again on the course that *New Mexico* tried to block of letting "wooden formalism" determine the great constitutional issue of the allocation of taxing power between the federal government and the states.

In so many words, the Court in *New Mexico* declared that "where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands." *Id.* at 734, 102 S.Ct. at 1383. "In such a situation the contractor's use of the property 'in connection with commercial activities carried on for profit,' is 'a separate and distinct taxable activity.' " *Id.* at 734-35, 102 S.Ct. at 1382-83, quoting *United States v. Boyd*, 378 U.S. 39, 44, 84 S.Ct. 1518, 1521-22, 12 L.Ed.2d 713 (1964). The Court concluded in *New Mexico* that "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico*, 455 U.S. at 735, 102 S.Ct. at 1383.

In the present case the United States argues that the levy falls on an instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities. The United States relies heavily on a dictum in a footnote in *United States v. County of Fresno, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977). In County of Fresno* the Court sustained a California tax on houses rented to Forest Service employees but stated that it would be different if there was a tax

imposed on a Forest Service employee for a fire ax that he used only in performing his job; in that case the tax would be on property the employee did not use for his "beneficial personal use" and on property that was not part of his profit or his salary. *Id.* at 466 n. 15, 97 S.Ct. at 707 n. 15. The United States argues that just as the Forest Service employee cannot be taxed on his fire ax, even though by its use he earns his salary, so Arcata cannot be taxed on the military equipment it uses, although from its use it derives a profit. What Arcata is doing when it runs the military games is to act as the United States. Arcata has, the Government contends, "no beneficial personal use."

Two other courts have reached the same conclusion as to analogous taxes. *See United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *summarily aff'd sub nom.; Jefferson County v. United States*, 450 U.S. 901, 101 S.Ct. 1335, 67 L.Ed.2d 325 (1981); *United States v. Hawkins County*, 859 F.2d 20 (6th Cir. 1988). In each of these cases the tax exceeded the profit of the contract. But, the United States notes, what was decisive for the Tenth Circuit in the Colorado case was not the amount of the tax but that the effect of the tax was "to lay an ad valorem general property tax on property owned by the United States." *United States v. Colorado*, 627 F.2d at 221. A similar analysis was followed by the Sixth Circuit. *United States v. Hawkins County*, 859 F.2d at 23.

The Government's spirited presentation demonstrates how old distinctions can be refurbished and confusion engendered despite the bright line laid down by *New Mexico*. Rejecting the Government's argument, I observe that in *New Mexico* itself the contractors were

managing Government laboratories, which the Government could have managed itself but chose not to do so. The Court observed that the Government "resists using its own employees for the tasks at hand . . . because it seeks to tap the expertise of industry." *United States v. New Mexico*, 455 U.S. at 737, 102 S.Ct. at 1384. As a consequence, the Court observed: "In contrast to federal employees, Sandia and its fellow contractors cannot be termed 'constituent parts' of the Federal Government." *Id.* at 740, 102 S.Ct. at 1386. No "complete" "congruence of professional interests" existed between the Government and the contractors. *Id.* The contractors were privately owned corporations in which the Government had no ownership interest. *Id.* The Government in our case has pointed to no distinction between Sandia in *New Mexico* and Arcata as a privately owned corporation whose professional interests are not completely congruent with the Government's.

The Government's reliance on the illustration of the Forest Service employee's fire ax is misplaced. The forester carries his ax to carry out a governmental function, not for commercial profit. In contrast, Arcata conducts the military games for its own profit. In the terms expressly used by *New Mexico* Arcata is engaged in "commercial activity carried on for profit." *Id.* 455 U.S. at 733, 102 S.Ct. at 1382. Consequently, Arcata does not enjoy immunity from Nye County's tax.

The majority's acquiescence in the Government's contentions and its apparently justified reliance on the Colorado case are undermined by the way the Supreme Court analyzed that case in *New Mexico* itself. The Court said:

> While a use tax may be valid only to the extent that it reaches the contractor's interest in Government-owned property, cf. *City of Detroit v. Murray Corp.*, 355 U.S. [489], at 494 [78 S.Ct. 458, 461, 2 L.Ed.2d 441 (1958)]; *United States v. Colorado*, 627 F.2d 217 (CA10 1980), summarily aff'd *sub nom. Jefferson County v. United States*, 450 U.S. 901 [101 S.Ct. 1335, 67 L.Ed.2d 325] (1981), there has been no suggestion here that the contractors are being taxed beyond the value of their use.

Id. 455 U.S. at 741 n. 14, 102 S.Ct. at 1386 n. 14. In short, the Supreme Court gave a different rationale for *United States v. Colorado* from that given by the Tenth Circuit – the rationale that a tax exceeding the value of the use was unconstitutional. At the same time the Court characterized the tax at issue as "a use tax," not an ad valorem tax on property. The majority offers no reason why exactly the same analysis should not apply to the entirely analogous Nevada tax at issue in this case.

The Nevada Property Tax Statute expressly exempts the property of the United States from taxation. Nev.R.Stat. § 361.050. No intention on the part of the state to infringe federal sovereignty and to tax the United States is present. It is irrelevant that the economic burden of the tax under these cost-plus contracts falls on the United States. *United States v. New Mexico*, 455 U.S. at 734, 102 S.Ct. at 1382-83. It is irrelevant that Arcata, as the district court found, is "the servant" of the United States. *Id.* at 733, 102 S.Ct. at 1382. It is irrelevant that Arcata owns none of the property used and that the United States owns all of it. *Id.* at 738, 102 S.Ct. at 1384-85. The United States, of course, has a sure remedy for any actual

infringement on its sovereignty: Congress can declare the contractor's activity exempt. *Id.* at 744, 102 S.Ct. at 1388. Once again a litigant is seeking "to establish as a constitutional rule something that it was unable to obtain statutorily from Congress." *Id.*

In *New Mexico,* the Court warned that "an immunity of constitutional stature" cannot rest "on such technical considerations" as the way a contract was drawn between the Government and its contractor. *Id.* at 737, 102 S.Ct. at 1384. While this caution was expressly directed at contractual technicality, the Court in the same paragraph warned against "the manipulation and wooden formalism that occasionally have marked tax litigation." *Id.* It is difficult to imagine a more wooden and technical approach than that taken by the majority in finding constitutional significance in the language used by the state to describe its tax. I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-15128
CT/AG#: CV-86-0670-HDM

UNITED STATES OF AMERICA (Filed Sep. 30, 1991)

Plaintiff-Appellee

v.

NYE COUNTY NEVADA;
BERNIE C. MERLINO,
Nye County Assessor

Defendants-Appellants

APPEAL FROM the United States District Court for the District of Nevada (Las Vegas).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Las Vegas) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered July 15, 1991

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NYE COUNTY NEVADA; BERNIE C. MERLINO, Nye County Assessor, Defendants-Appellants.	No. 90-15128 D.C. No. CV-86-0670-HDM ORDER (Filed Sep. 18, 1991)

Before: PREGERSON, NOONAN and THOMPSON, Circuit Judges.

A majority of the panel, as constituted above, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX F

I. Article VI, clause 2 of the United States Constitution provides:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

II. Nev. Rev. Stat. § (NRS) 361.159 provides:

361.159 Exempt personal property subject to taxation if used in business conducted for profit.

1. Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a natural person, association or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property, except for personal property used in vending stands operated by blind persons under the auspices of the bureau of services to the blind of the rehabilitation division of the department of human resources.

2. Taxes must be assessed to lessees or users of exempt personal property and collected in the same manner as taxes assessed to owners of other personal property, except that taxes due under this section do not become a lien against the personal property. When due, the taxes constitute a debt due from the lessee or user to the county for which the taxes were assessed and if unpaid are recoverable by the county in the proper court of the county.

(2)

No. 91-1001

In the Supreme Court of the United States

OCTOBER TERM, 1991

NYE COUNTY, NEVADA, AND BERNIE C. MERLINO
NYE COUNTY ASSESSOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a private contractor that lacks a beneficial personal interest in federal property that it operates and maintains under a service contract with the United States is subject to a state *ad valorem* property tax with respect to that property.

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OCTOBER TERM, 1991

No. 91-1001

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NYE COUNTY ASSESSOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-21) is reported at 938 F.2d 1040. The opinion of the district court (Pet. App. 1-7) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on July 15, 1991. The petition for rehearing was denied on September 18, 1991. Pet. App. 23. The petition for a writ of certiorari was filed on December 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tolicha Peak Electronic Combat Range and the Tonopah Electronic Combat Range are owned by the United States. At these facilities located in Nye County, Nevada, the United States has electronic equipment that simulates Soviet defense systems. The Air Force uses this equipment to devise battle scenarios and simulated combat environments to stage training exercises for its pilots. Since 1980, the Air Force has contracted with Arcata Associates, Inc. (Arcata) to operate and maintain this equipment. Arcata has neither a property interest in the equipment nor a right to use the equipment for its own account or business. Its only access to the equipment is at the time and place and in the manner directed by the United States.[1] Arcata can not exclude Air Force personnel or other contractors from operating or maintaining the equipment. The United States can terminate its relationship with Arcata at will. Pursuant to the contract, the United States reimburses Arcata for all costs incurred in operating and maintaining the electronic equipment and pays Arcata a fixed base fee and a performance award fee for its services. Those fees are unrelated to the value of the equipment that Arcata services. Pet. App. 2-4, 12.

Claiming that Arcata has a taxable interest in this federal equipment (Pet. App. 12), petitioners assessed a personal property tax against Arcata under Nev. Rev. Stat. Ann. § 361.159 (Michie 1991). That statute provides in pertinent part (*ibid.*):

> Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a natural person, association or corporation in

[1] Arcata spends approximately 75% of its time under the contract in maintaining the equipment and 25% of its time in operating the equipment (Pet. 3).

> connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property.

For tax years 1983-1984 through 1988-1989, petitioners assessed taxes against Arcata under this statute in the total amount of $127,414.03 (Pet. App. 4, 9, 13). [2] Arcata paid the taxes under protest and was reimbursed by the United States as required by the contract (*id.* at 13).

2. The United States filed this suit to recover the taxes, to obtain a declaratory judgment that assessment of the tax is unconstitutional and to enjoin further assessments (Pet. App. 1, 11, 13). The district court held the tax unconstitutional as applied because Arcata has no beneficial personal use of the federal property that it operates and maintains, and the incidence of the tax is therefore solely upon property owned by the United States (*id.* at 1-9).

The court of appeals affirmed, with one judge dissenting (Pet. App. 11-21). The court stated (*id.* at 15-16 (citation omitted)):

> * * * the Nevada statute under which Nye County seeks to impose its tax against Arcata taxed the user "in the same amount and to the same extent as though the lessee or user were the owner of the property." * * * Here, the property belongs to the United States. Arcata has no leasehold interest in it, but merely has the privilege, terminable at the will of the government, to use the property at the time and place and in the manner directed by the United States. Nye

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[2] Petitioners claim that the tax is based upon Arcata's declaration of the value of the taxed property and Arcata's declaration of its percentage of use of the property (Pet. 4). The evidence revealed, however, that Arcata was taxed at the full value of the federal property, as though Arcata was the owner of the property, even though Arcata indicated it had "0 beneficial use" in the property (Pltf.'s Trial Exh. 1).

> County makes no attempt to segregate and tax any possessory interest Arcata may have in the property, or Arcata's beneficial use of the property. Nye County simply taxes Arcata as if it were the owner of the property. The tax effectively lays "an *ad valorem* general property tax on property owned by the United States." [*United States* v.] *Colorado*, 627 F.2d [217,] 221 [(10th Cir. 1980), aff'd *sub nom. Jefferson County*, v. *United States*, 450 U.S. 901 (1981)].

The court found that petitioners had failed to identify and segregate any beneficial use of Arcata on which to impose the tax. The court also found that the taxing statute improperly required taxation of the full value of the property to Arcata without giving account to the limited beneficial use (if any) that Arcata may have had (Pet. App. 16). The court accordingly determined that the tax, as applied, is an *ad valorem* tax on property of the United States and is therefore unconstitutional (*ibid.*).

The dissent recognized (Pet. App. 18) that the court's decision finds support in *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981), and *United States* v. *Hawkins County*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 490 U.S. 1005 (1989). The dissenting judge believed, however, that this Court's decision in *United States* v. *New Mexico*, 455 U.S. 720 (1982), permits application of the State's tax to a federal contractor without identifying and segregating the contractor's beneficial personal use (Pet. App. 19-21).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. It is now settled law that a State may tax a private person's leasehold or possessory interest in federal property so long as the tax is limited to the contractor's

beneficial personal use of that property. *United States* v. *New Mexico*, 455 U.S. 720, 741 n.14 (1982); *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981); *United States* v. *County of Fresno*, 429 U.S. 452, 462, 466 n.15 (1977). When a tax fails to identify, segregate and evaluate the private party's interest in property owned by the federal government, and is based on a value that exceeds the private party's interest in that property, however, the tax is on the federal government's property and violates the United States' immunity from local taxation. *United States* v. *County of Fresno*, 429 U.S. at 462-463 n.10.

In this case, the courts below correctly found (Pet. App. 16) that petitioners did not segregate any beneficial use that Arcata itself may have had in the property but instead taxed Arcata as if it were the sole owner of the property. The dissent does not dispute this finding and, contrary to petitioners' contention (Pet. 4-5), the record amply supports the courts' conclusion. See note 2, *supra*. Petitioners' continuing dispute with the concurrent factual conclusions of the lower courts does not merit further review. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

Moreover, the record demonstrates that Arcata has no beneficial personal use of the federal property it has been hired to maintain and operate under the direction of the Air Force. Arcata has no license, permit or right to use the property for its own private purposes. Instead, Arcata is paid a fee for performing services called for by its contract—a fee unrelated to the value of the federal property involved. Arcata can not exclude the Air Force from access to the equipment and its contract may be terminated without notice (Pet. App. 2-4, 6, 12).[3] While the

[3] Indeed, the evidence established that Air Force personnel and other government agencies operated this same equipment (RT 48, 55,

evidence thus reflects that Arcata lacks *any* beneficial personal use in the property that might be reached by a state taxing statute, the Nevada statute sought to tax not only Arcata's interest but instead taxed the full value of the property. As the court of appeals held (*id.* at 16), the tax thus improperly fell upon the federal government's property.

The decision in this case represents a direct application of this Court's decisions in *United States* v. *County of Fresno*, *supra*, and *Jefferson County* v. *United States*, *supra*, which hold that an annual *ad valorem* property tax imposed upon a user of federal property must bear some reasonable relationship to the value of the user's "beneficial personal use" of the property. *County of Fresno* involved federal Forestry Service employees who were required by the United States to live in rental housing in national forests in California. This Court upheld California's annual *ad valorem* tax on the employees' possessory interest in the housing, based upon the estimated fair rental value of the housing. The Court held that this tax was based upon the employees' possessory interest in the housing and not upon the federal property or on a federal function. The Court warned, however, that (429 U.S. at 466 n.15):

> [a]n attempt by California to impose a use tax on a Forest Service employee for his fire ax—which he used *only* in performing his job—or on a fire tower inhabited by such employee in the daytime and solely in order to perform his job would present a different question. The employee does not put either the ax or the tower to "beneficial personal use," and it is not part of his "profit" or his "salary." *United States* v. *City of Detroit*, [355 U.S. 466,] 471 [(1958)].

56, 84, 126, 159, 167). "RT" refers to pages in the reporter's trial transcript.

The Court thus held in *County of Fresno* that only a "beneficial personal use"[4] in leasing or using federal property could be taxed and that a person's use in his job of federal property (such as a fire ax or a fire tower) could not be taxed. 429 U.S. at 466. In *Jefferson County*, this Court affirmed the Tenth Circuit's decision in *United States* v. *Colorado*, holding that a Colorado *ad valorem* property tax was unconstitutionally imposed upon a federal contractor on account of its management of a nuclear plant owned by the United States pursuant to the contract with the United States when, as here, the tax was based upon the full value of the nuclear facility (627 F.2d at 219-221). See 450 U.S. at 901. The Tenth Circuit noted in its decision that the contractor had no leasehold interest, permit or license in the property in question, and that any use the contractor made of the federal property was strictly delineated by contract. 627 F.2d at 219. The court concluded that the contractor's use of the federal property was so limited by its contract with the United States that the value of any beneficial interest or use which the contractor might have had in the property was necessarily less than the full market value of the property. *Ibid.* The tax thus necessarily, at least in part, was on property of the United States. *Ibid.*

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[4] The term "beneficial personal use" was first used in this context by this Court in *United States* v. *County of Allegheny*, 322 U.S. 174, 187-188 (1944). In that case, this Court, while holding certain federal property to be immune from Pennsylvania's *ad valorem* real property tax in the hands of a federal contractor because the state made no effort to segregate the contractor's interest, recognized that the contractor's "personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed" (322 U.S. at 188). In *United States* v. *City of Detroit*, 355 U.S. 466 (1958), the Court upheld imposition of a tax on a lessee's leasehold interest in federal property, stating that "[h]ere we have a tax which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'." 355 U.S. at 472.

Arcata's use of the federal equipment in this case is much like the use of the fire ax or tower mentioned in *County of Fresno*. See 429 U.S. at 466 n.15. Moreover, as in *Jefferson County*, the contractual restrictions placed on Arcata's use of the equipment demonstrate that, if Arcata has any beneficial personal use in the property at all, the value of that beneficial use is necessarily less than the total value of the property. In this situation, a tax computed on the full value of the property necessarily falls at least in part upon property of the United States and is therefore unconstitutional. See *United States* v. *Hawkins County*, 859 F.2d 20, 23 (6th Cir. 1988), cert. denied, 490 U.S. 1005 (1989).

The dissent errs in concluding (Pet. App. 16-21) that this case is essentially the same as *United States* v. *New Mexico*, in which this Court upheld imposition of a state excise tax on a federal contractor's gross receipts and a state compensating use tax on property for which no state sales tax had been paid.[5] In *New Mexico*, the Court concluded that a use tax is valid only to the extent that it reaches the contractor's interest (if any) in federal property and pointed out that no suggestion had been raised in that case that the contractors were being taxed beyond the value of their use. 455 U.S. at 741 n.14. By contrast, petitioners have not limited the tax in this case to reach only the value of Arcata's use, but have instead taxed Arcata as if it were the sole owner of the property. The decision in *New Mexico* does not sanction a tax that is not limited to the value of the contractor's use.

2. Contrary to petitioners' assertion (Pet. 8-15), the decision in this case is also consistent with this Court's

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[5] The dissent mischaracterizes the federal government's argument as depending upon an assertion that Arcata is an agent of the United States (Pet. App. 17-19). As the majority of the court of appeals pointed out, the United States conceded that Arcata is not an agent or instrumentality of the government (*id.* at 12 n.1).

decisions in *United States* v. *City of Detroit*, 355 U.S. 466 (1958), *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958), *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958), and *United States* v. *Boyd*, 378 U.S. 39 (1964), and with the decision of the Nevada Supreme Court in *United States* v. *State ex rel. Beko*, 493 P.2d 1324 (1972).

a. In *United States* v. *City of Detroit*, 355 U.S. at 472-474, *United States* v. *Township of Muskegon*, 355 U.S. at 486-487, and *City of Detroit* v. *Murray Corp.*, 355 U.S. at 492-495, the Court sustained imposition of an *ad valorem* property tax and personal property tax imposed upon a contractor's interest in federal property used by the contractor in its manufacturing business. In sustaining these taxes, the Court was careful to point out that the taxes reached only the contractor's interest in the property and did not reach any interest of the federal government. See, *e.g.*, *id.* at 494.

In contrast to the situation in those three cases, petitioners failed in this case to segregate and tax only the interest (if any) that Arcata has in use of the federal property. Moreover, the courts below found that, in fact, Arcata has *no* beneficial use of the taxed property and has no estate, leasehold, license, permit or any other rights, title or interest in the federal property (Pet. App. 2-3, 16). Thus, while the contractors in the above three decisions had leasehold or beneficial interests in federal property that could be subjected to an *ad valorem* tax, no such beneficial use or interest exists in the present case.

b. Petitioners' reliance (Pet. 11) upon *United States* v. *Boyd* is likewise misplaced. *Boyd* involved a compensating use tax imposed upon property brought into and used in the State of Tennessee on which no Tennessee sales or use tax had otherwise been paid. This tax was imposed upon the mere first use of property in Tennessee by a non-exempt person, and it was complementary to Tennessee's sales tax and was computed at the sales tax rates. This tax was not an *ad valorem* property tax but was a tax to compensate for the loss of sales tax on property used in

Tennessee. 378 U.S. at 43. See *United States* v. *Hawkins County*, *supra*; *United States* v. *Anderson County*, 761 F. 2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985). Since the contractor in the present case has no beneficial use of the federal property, however, the tax falls only on federal property and is therefore unconstitutional. See 378 U.S. at 44.

c. Although petitioners assert (Pet. 8-9) that the Nevada Supreme Court's decision in *United States* v. *State ex rel. Beko*, *supra*, conflicts with the decision of the court of appeals, neither the district court nor the court of appeals (including the dissenting judge) found that decision relevant to the disposition of this case. In *Beko*, the United States contended that the tax statute was unconstitutional because it had been applied discriminatorily against the United States and its contractors and because the incidence of the tax fell on the United States. See 493 P.2d at 1327-1331. In the present case, the United States raised the different contention that the tax statute is unconstitutional because it taxes federal property in the hands of a contractor who has no beneficial use, interest, or property rights in the taxed property. Contrary to petitioners' contention, the decision of the court of appeals thus does not conflict with the *Beko* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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